Backgrounder

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THE NOTWITHSTANDING CLAUSE: ITS HISTORY AND FUTURE

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INTRODUCTION

The constitutional notwithstanding clause set out in s. 33 of the Canadian Charter of Rights and Freedoms has been controversial since its emergence from a November 1981 Federal-Provincial Conference of First Ministers. The divergence of views has not abated, but has become more pronounced since that time. The debate has become more vigorous and more pressing since the 15 December 1988 Supreme Court of Canada decisions in the Chaussures Brown's and Singer cases dealing with the signage provisions of Bill 101 Charter of the French Language) and the subsequent adoption by the Quebec National Assembly of Bill 1978 (An Act to Amend the Charter of the French Language) containing a s. 33 override clause (in this case overriding Charter of Rights guarantees of freedom of expression (s. 2(b)) and equality rights (s. 15)).

CONTENT OF SECTION 33

Section 33(1) of the Charter of Rights permits Parliament or a provincial legislature to adopt legislation to override s. 2 of the Charter (such fundamental rights as freedom of expression, freedom of conscience, freedom of association and freedom of assembly) and ss. 7-15 of the Charter (right to life, liberty and security of the person, freedom from unreasonable search and seizure, freedom from arbitrary arrest or

detention, a number of other legal rights, and the right to equality). Such a use of the notwithstanding power must be contained in an Act, and not subordinate legislation (regulations), and must be express rather than implied.

Under s. 33(2) of the Charter of Rights, the invocation of s. 33(1) by Parliament or a legislature causes the overriding legislation to have the effect of making the relevant Charter rights "not entrenched" for the purposes of that legislation. In effect, the doctrine of parliamentary sovereignty is revived for the purposes of the particular exercise of the override power in the specific legislative context. Section 33(3) provides that each exercise of the notwithstanding power has a lifespan of five years or less, after which it expires unless Parliament or the legislature re-enacts it under s. 33(4) for a further period of five years or less.

A number of rights entrenched in the Charter are not subject to the recourse to s. 33 by Parliament or a legislature. These are democratic rights (ss. 3-5 of the Charter), mobility rights (s. 6) language rights (ss. 16-22), minority language education rights (s. 23), and the guaranteed equality of men and women (s. 28). Also excluded from the s. 33 override are s. 24 (enforcement of the Charter), s. 27 (multicultural heritage), and s. 29 (denominational schools) - these provisions do not, strictly speaking, guarantee rights.

All rights and freedoms set out in the Charter are guaranteed and subject to reasonable limitations under the terms of s. 1. This has the effect, in combination with s. 32 of the Charter (making it binding on Parliament and the legislatures) and s. 52 of the Constitution Act, 1982 (making the constitution, of which the Charter is a part, the supreme law of Canada), of entrenching the rights and freedoms set out in the Charter. The effect of s. 33, and especially of s. 33(2), is to pierce the wall of constitutional entrenchment and resurrect, in particular circumstances, the sovereignty of Parliament or a legislature. Consequently, the Charter is a unique combination of rights and freedoms, some of which are fully entrenched, others of which are entrenched unless overridden by Parliament or a legislature.

ORIGINS OF SECTION 33

The establishment of a legislative override in a constitutional context appears to be a uniquely Canadian development. There appears to be no equivalent in either international human rights documents or western democratic human rights declarations.(1) A number of Canadian legislative precedents undoubtedly provided the backdrop against which s. 33 was developed in 1981. There are notwithstanding provisions contained in the Canadian Bill of Rights,(2) the Saskatchewan Human Rights Code,(3) the Alberta Bill of Rights(4) and the Quebec Charter of Human Rights and Freedoms.(5) Each of these provisions says that the Bill of Rights, Code or Charter is to have primacy over conflicting legislation unless that legislation provides explicitly that it overrides the human rights provisions.

It is difficult to determine when the idea of a constitutional notwithstanding provision was first proposed during the 1980-82 constitutional patriation process. The recollections of both participants in and observers of this process differ on this issue. Hence, the origins of s. 33 can only be described in general terms.(6)

It is highly probable that the participants in the 1980-82 federal-provincial negotiations were familiar with the legislative human rights notwithstanding provisions then in existence at both the federal and

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(1) Dale Gibson, The Law of the Charter: General Principles, Carswell, Toronto, 1986, p. 125.

(2) R.S.C. 1985, Appendix III, s. 2.

(3) C.S.S., c. S-24.1, s. 44.

(4) R.S.A. 1980, c. A-16, s. 2.

(5) R.S.Q., c. C-12, s. 52.

(6) The balance of this part of the paper is drawn from: Philip Rosen, "The Section 33 Notwithstanding Provision of the Charter of Rights", Research Branch, Library of Parliament, 21 August 1987.

provincial levels. It appears that the idea for a notwithstanding provision was first proposed by Saskatchewan during the Summer of 1980 as part of the deliberations of the Federal-Provincial Continuing Committee of Ministers Responsible for Constitutional Affairs (C.C.M.C.). It was seen as a compromise between those for and those against an entrenched Charter of Rights. The differences in view at that time were too wide to be breached by this proposed compromise.(7)

The idea of a notwithstanding clause next surfaced during the Federal-Provincial meeting of First Ministers in the period 8-13 September 1980 in Ottawa. On 11-12 September 1980, the Government of Quebec circulated a document entitled "A Proposal for a Common Stand of the Provinces" to the other provinces. This discussion paper attempted to find common positions on a number of issues. In relation to the Charter of Rights, the proposal was to entrench fundamental and democratic rights, and to make legal and non-discrimination rights subject to a notwithstanding provision. Ultimately, this discussion paper came to be known as the "Chateau consensus" but it was never really agreed to by all the provinces - eventually, even Quebec backed away from it.(8)

Once the September 1980 Federal-Provincial Conference of First Ministers broke down, activity continued in the parliamentary, judicial and diplomatic arenas. Finally, on 28 September 1981, the Supreme Court of Canada rendered its decisions on three constitutional reference cases that had come to it from the Courts of Appeal of Manitoba, Newfoundland and Quebec. The Supreme Court of Canada concluded that the Federal government had the strict legal right to engage in unilateral constitutional patriation but that, based on convention, it needed some degree of provincial support - less than unanimity but more than two provinces - to proceed.

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(7) Roy Romanow, John White and Howard Leeson, Canada ... Notwithstanding: The Making of the Constitution 1976-1982, Carswell/Methuen, Toronto, 1984, p. 45.

(8) Robert Sheppard and Michael Valpy, The National Deal: The Fight for a Canadian Constitution, Fleet Books, Toronto, 1982, pp. 60-62.

Consequently, throughout October 1981, a number of meetings took place among federal and provincial officials and Ministers. These meetings were in preparation for a Federal-Provincial Conference of First Ministers to be held between 2 and 5 November 1981. One measure proposed at different times and in different forms by Alberta, British Columbia and Saskatchewan was the possibility of a notwithstanding provision.

NOVEMBER 1981 FIRST MINISTERS CONFERENCE

The Conference seemed to be at a stalemate on the afternoon of 4 November 1981 when the Federal Minister of Justice Jean Chrétien, and the Attorneys General of Ontario and Saskatchewan, Roy McMurtry and Roy Romanow, worked out a possible compromise. The text of the agreement ultimately worked out by officials, without Quebec's participation, included, among other elements, entrenchment of a Charter of Rights with a notwithstanding provision applicable to fundamental freedoms, legal rights and equality rights. Once the draft agreement had been prepared overnight 4-5 November 1981, it was submitted to the Ministers and First Ministers. Jean Chrétien said his government had not agreed that fundamental freedoms could be overridden - just legal and equality rights. Ultimately, Prime Minister Trudeau was convinced to agree to the extension of the notwithstanding provision to fundamental freedoms only on condition that the provision as a whole be subject to a five-year sunset and re-enactment clause. Consequently, in public session on 5 November 1981, all governments, except that of Quebec, signed the constitutional accord containing the notwithstanding provision.(9)

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(9) For a more detailed recounting of these events, see: Romanow et al. (1984), pp. 197-215; Sheppard and Valpy (1982), pp. 263-302; and Edward McWhinney, Canada and the Constitution 1979-82: Patriation and the Charter of Rights, University of Toronto Press, Toronto, 1982, pp. 90-101. For the personal memoirs of participants in these events see: R. Roy McMurtry, "The Search for a Constitutional Accord - A Personal Memoir", (1982) 8 Queen's Law Journal 28; and Roy Romanow, "Reworking the Miracle: The Constitutional Accord 1981", (1982) 8 Queen's Law Journal 74.

All was not finished, however, since s. 33, in its form at that time, would not only have allowed for an override of s. 15 equality rights, but also of s. 28 which guaranteed the equality of men and women. As a result of a massive pressure campaign organized by feminist and human rights groups across Canada, both federal and provincial governments agreed to withdraw any reference to s. 28 from s. 33.(10)

FRAMERS' INTENTIONS

As indicated earlier in this paper, the injection of the s. 33 notwithstanding clause into the Charter of Rights in 1981 aroused great controversy at the time which has not abated to this day. The acceptance (reluctant in some cases) of the notwithstanding clause by the participants in the November 1981 First Ministers Conference (except for Quebec), allowed the impasse to be broken and the Charter of Rights, among other constitutional changes, to become reality.

Because of the controversy surrounding the adoption of s. 33, many participants in the First Ministers Conference, parliamentarians and commentators, have indicated how they believed the notwithstanding provision would be used.

Several participants in the November 1981 First Ministers Conference made statements on the day the constitutional agreement was reached and made public. Richard Hatfield, then Premier of New Brunswick, said:

> I am concerned about the fact that there are provisions for opting out in important areas. I want to give you an undertaking that I will do everything possible to urge the Legislature of New Brunswick not to use that opportunity, consistent with my firm view that if we

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(10) Penney Kome, The Taking of Twenty-Eight: Women Challenge the Constitution, The Women's Press, Toronto, 1983, pp. 83-85; and Chaviva Hosek, "Women and the Constitutional Process", in Keith Banting and Richard Simeon (eds.), And No One Cheered: Federalism, Democracy and the Constitution Act, Methuen, Toronto, 1983, pp. 280-300.

> are going to have rights, they must be shared by all Canadians, regardless of where they live.(11)

G.W.J. Mercier, Attorney General of Manitoba at the time, stated that:

> ...the rights of Canadians will be protected, not only by the constitution but more importantly by a continuation of the basic political right our people have always enjoyed - the right to use the authority of Parliament and the elected Legislatures to identify, define, protect, enhance and extend the rights and freedoms Canadians enjoy.(12)

Allan Blakeney, then Premier of Saskatchewan, indicated in the following words how he believed the notwithstanding clause would be used by Parliament and the legislatures:

> It contains a Charter of Rights which protects the interests of individual Canadians, yet in several vital areas allows Parliament and Legislatures to override a court decision which might affect the basic social institutions of a province or region and this is fully consistent with the sort of argument we have put forward that we need to balance the protection of rights with the existence of our institutions which have served us so well for so many centuries.(13)

These public statements by participants illustrate the tension inherent in the diversity of views in the debate over the entrenchment of rights and the possibility of their being overridden.

Shortly after the First Ministers Conference, Pierre Trudeau, then Prime Minister of Canada, indicated that the Charter of Rights was not as good as it could have been and expressed his less than enthusiastic acceptance of the notwithstanding clause when he said:

> I must be honest and say that I don't fear the notwithstanding clause very much. It can be abused as anything can, but the history of the Canadian Bill of Rights Diefenbaker had adopted in 1960, it has a

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(11) Canadian Inter-Governmental Conference Secretariat, Federal-Provincial Conference of First Ministers on the Constitution, Verbatim Transcript, 5 November 1981, p. 114.

(12) Ibid., p. 115.

(13) Ibid., p. 125.

> notwithstanding clause and it hasn't caused any great scandal (sic). So I don't think the notwithstanding clause deters very significantly from the excellence of the Charter.(14)

He went on to say later in the same interview:

> ...it is a way that the legislatures, federal and provincial, have of ensuring that the last word is held by the elected representatives of the people rather than by the courts.(15)

Roy McMurtry, who participated in the First Ministers Conference as Attorney General of Ontario, had the following to say in a memoir:

> The fact is that the clause does provide a form of balancing mechanism between the legislators and the courts in the unlikely event of a decision of the courts that is clearly contrary to the public interest. On the other hand, political accountability is the best safeguard against any improper use of the "override clause" by any parliament in the future.(16)

Other participants in the 1981 First Ministers Conference have indicated their views about the possible recourse to the notwithstanding clause. Thomas S. Axworthy has said:

> ...the non-obstante clause will not be employed lightly; the 1960 Federal Bill of Rights had a similar override provision and it was only employed once in two decades (in 1970 with the Public Order Temporary Measures Act), and the provinces have shown a similar disinclination to use the over-ride provisions contained in their provincial human rights legislation.(17)

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(14) Transcript of an Interview with the Prime Minister by Jack Webster, on CHAN-TV Vancouver, 24 November 1981, p. 5.

(15) Ibid., p. 6.

(16) McMurtry (1982), p. 65.

(17) Thomas S. Axworthy, "Colliding Visions: The Debate Over the Charter of Rights and Freedoms 1980-81", in Weiler and Elliot (eds.), Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms, Carswell, Toronto, 1986, p. 24.

James Matkin, who, as an official with the British Columbia government, played a key role in developing the 1981 constitutional compromise, later indicated that the provinces proposing the notwithstanding clause made the following argument:

> ...we argued that such a provision would rarely be invoked. As La Forest concludes, the political unpopularity of making declarations contrary to the Charter will militate against its use.(18)

The manner in which it was expected the notwithstanding clause would be used were most concisely stated by Jean Chrétien, then Minister of Justice, when he said:

> What the Premiers and Prime Minister agreed to is a safety valve which is unlikely ever to be used except in non-controversial circumstances by Parliament or legislatures to override certain sections of the Charter. The purpose of an override clause is to provide the flexibility that is required to ensure that legislatures rather than judges have the final say on important matters of public policy.
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> ....
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> It is important to remember that the concept of an override clause is not new in Canada. Experience has demonstrated that such a clause is rarely used and when used it is usually not controversial.
>
> ....
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> It is because of the history of the use of the override clause and because of the need for a safety valve to correct absurd situations without going through the difficulty of obtaining constitutional amendments that three leading civil libertarians have welcomed its inclusion in the Charter of Rights and Freedoms.(19)

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(18) James S. Matkin, "The Negotiation of the Charter of Rights: The Provincial Perspective", in Weiler and Elliot (eds.), ibid., note 17, p. 41.

(19) Canada, House of Commons, Debates, 20 November 1981, pp. 13042-13043. The three civil libertarians cited by Mr. Chrétien are Alan Borovoy, Gordon Fairweather and Walter Tarnopolsky, based on articles in the Montreal Gazette of 7 November 1981 and the Globe and Mail of 9 November 1981.

A number of other commentators also subsequently indicated how they expected Parliament and the legislatures to use s. 33. Gerard V. La Forest, then of the New Brunswick Court of Appeal and now of the Supreme Court of Canada, made the following comment in 1983:

> My guess is that this provision will rarely be used. The political unpopularity of making declarations contrary to the Charter will militate against this. That certainly has been the experience with the Canadian Bill of Rights and with Quebec's Charter of Rights and Freedoms. I am aware, of course, of Quebec's general attempt not to be bound by the Charter, but this was done in the context of a transcendent political situation that is not in its essence centred on questions of human rights.(20)

Peter Hogg has said:

> Presumably, the exercise of the power would normally attract such political opposition that it would rarely be invoked,....
>
> ....
>
> ...the necessity of re-enactment every five years will force periodic reconsideration of each exercise of the over-ride power, at intervals which (in some jurisdictions at least) will often yield a change of government. This reinforces the already powerful political safeguards against an ill-considered use of the power.(21)

And finally, Paul C. Weiler had this to say about the notwithstanding clause:

> Since the Canadian polity had shown itself sufficiently enamoured of fundamental rights to enshrine them in its Constitution, invocation of the non obstante clause was guaranteed to produce a great deal of political flak. No government can risk taking such a step unless it is certain that there is widespread support for its position....
> ...Canadian judges are given the initial authority to determine whether a particular law is a "reasonable

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(20) Gerard V. La Forest, "The Canadian Charter of Rights and Freedoms: An Overview", (1983) 61 Canadian Bar Review 19 at p. 26.

(21) Peter Hogg, "A Comparison of the Bill of Rights and the Charter", in Tarnopolsky and Beaudoin (eds.), The Canadian Charter of Rights and Freedoms: Commentary, Carswell, Toronto, 1982, p. 11.

> limit [of a right] ... demonstrably justified in a free and democratic society". Almost all of the time, the judicial view will prevail. However, Canadian legislatures were given the final say on those rare occasions where they disagree with the courts with sufficient conviction to take the political risk of challenging the symbolic force of the very popular Charter. That arrangement is justified if one believes, as I do, that on those exceptional occasions when the court has struck down a law as contravening the Charter and Parliament re-enacts it, confident of general public support for this action, it is more likely the legislators are right on the merits than were the judges.(22)

These comments by participants in the 1981 First Ministers Conference, parliamentarians and various commentators on the use to which s. 33 was expected to be put, share a number of common elements. They saw s. 33 as a safety valve to be used on only rare occasions. They expected that it would be used in relation to non-controversial issues, whatever that may mean. They anticipated that s. 33 would be used to preserve basic social and political institutions. In their view, resort to s. 33 would enbable legislatures to overcome unacceptable judicial determinations where there was popular support for doing so.

Experience so far has shown at least three situations where s. 33 was used in a way not foreseen by those participating in the 1981 First Ministers Conference or by commentators. They did not foresee the omnibus, routine invocation of s. 33 as was done by the Quebec National Assembly between 1982 and 1985. They did not foresee the preventive use of s. 33 as was done by Saskatchewan in relation to back-to-work legislation.(23)

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(22) Paul C. Weiler, "The Evolution of the Charter: A View from the Outside", in Weiler and Elliot, op. cit., note 17, p. 57.

(23) Saskatchewan Government Employees Union Dispute Settlement Act, S.S. 1984-6, c. 111. For a discussion of this legislation and related issues see: Donna Greschner and Ken Norman, "The Courts and Section 33", (1987) 12 Queen's Law Journal 155.

Finally, they did not foresee the situation where a government said it was in agreement with a court ruling, passed a legislative measure which it said was consistent with the spirit of the court ruling (although this might be debatable) and for greater certainty, and to avoid litigation on the measure, included a s. 33 override clause. This is arguably what may be said, in general terms, to have happened when the Quebec National Assembly adopted Bill 178 following the 15 December 1988 Supreme Court of Canada decisions in the Chaussures Brown's and Singer cases.

THE DEBATE ON THE OVERRIDE: FURTHER CONSIDERATIONS AND ALTERNATIVES

We have seen how the override has been defended as a legislative safety valve, permitting a balancing of interests or an avoidance of an unforeseen court decision which strikes down legislation for which general support exists and which represents an incidental infringement of rights. Although in light of section 1 of the Charter, the reasonable limitations clause, a decision of this type may seem unlikely, it is not impossible. Allan Blakeney provided the example of the Saskatchewan Human Rights Code which prohibits discrimination on the basis of various grounds including age and sex but exempts accommodation within a self-contained, owner-occupied dwelling unit. Surely, he argued, a person ought to be able to choose the age group and gender of another with whom he or she proposed to share a dwelling. Yet section 1 alone, in Blakeney's view, could not guarantee that this right of choice would be protected. The presence of a safety valve would also give legislatures a way of avoiding the necessity of having to alter at prohibitive expense legislation which was found to offend the Charter. Such alteration, it has been speculated, could be mandated by judicial decisions in such areas as mandatory retirement and social benefit programs which are selective as to eligibility to receive the benefit in question.

It can be argued as well that a legislative override, by allowing final political decisions to be made by the elected representatives will mitigate the politicization of the courts. One has only to look at the example of the United States where the courts interpret and apply a constitution which has no equivalent to section 33. In that sense, judicial decisions about the Constitution have a greater finality and the stakes are correspondingly higher in the outcome of constitutional litigation. There is hence a significant political element in the selection of judges, particularly at the Supreme Court level. This political element has been openly acknowledged; indeed, the President's power to nominate the judges of federal courts has meant that the composition of those courts is quite regularly an issue in presidential election campaigns. A President may have the opportunity to name ideologically compatible judges who will continue to exercise a great deal of power long after the President has left office. The majority of the present membership of the Supreme Court of the United States, for example, has served on that bench for at least 15 years. President Richard Nixon had the opportunity to select four justices (and would have had the chance to select a fifth if he had served out his second term) while President Jimmy Carter selected none.

In contrast, in Canada, there has been little evidence that judges are selected according to how they would rule in various cases. If the Charter did not contain a notwithstanding clause and the courts were the final arbiters of social values, it seems safe to speculate that this situation would be vulnerable to change.

Nonetheless, the existence of the override still offends some constitutionalists, who see in it a profound flaw in the entrenchment of rights. In their view, it is precisely because the override will most often be used when legislative initiatives are taken to suppress unpopular rights that it should not exist. The presence of the reasonable limitations clause, in this argument, is sufficient to guarantee against highly literal judicial readings of the rights and freedoms, with subsequent and undesirable consequences. In other words, the courts themselves, relying on section 1, already possess the tools to carry out the balancing of

interests and values. The notion that the balancing must be done by the legislators is without merit and even suspect, according to the proponents of this argument.

Some alternatives to the present clause can be contemplated. One would be to shorten the maximum period during which an override would remain in effect, thus necessitating its more frequent renewal. Whether this would deter governments from using it is open to question; if public opinion favours the enactment of legislation which derogates from a freedom or right guaranteed by the Charter, it is not at all certain that more frequent renewal will incite politically significant opposition to its use.

Another possibility would be to limit the number of times the clause could be renewed. This would permit its use in situations where time was required to allow adjustment to the effects of a judicial decision striking down legislation. However, obviously this argument would be inapplicable where the subject of the legislation was such that adjustment would not be possible. An example would be the matter of abortion. If we suppose that the courts ruled that no legislation restricting access to abortions would be constitutionally permissible, it is evident that nothing could be done over a given period of years to adjust to certain inalterable facts if it were desired to enact such legislation. Once the period during which the override could be used had expired, the situation would revert to the status quo at the time restrictive legislation was declared unconstitutional. It could be argued that in such cases, the proper course would be for the government concerned to seek a constitutional amendment to permit effective legislation to be put in place. According to this argument, the constitution should be an accurate reflection of societal values and not a document which can be circumvented when it is interpreted not to express those values. A counter argument would likely be that the override is simply a convenient, expeditious way to avoid having to resort to the amendment procedure. This argument would presumably state that the integrity of the constitution would be undermined if legislators became accustomed to amending it whenever its provisions threatened legislation. It would be preferable in this view that the constitution remain intact,

but that, where necessary, legislatures be permitted to pass laws which derogated from its provisions. Otherwise, the constitution would cease to be a clear, concise expression of basic values and would increasingly be littered with exemptions and exceptions. Furthermore, it might be difficult to devise amendments which would permit a given law to survive in the face of conflict with the terms of the constitution without curbing those terms further than intended. In this argument, a constitution is a broad statement of a society's values which at its best can inspire and inform the citizenry, not a lengthy list of "cans" and "cannots" for governments.

Another method to curb the use of the override has been proposed by McGill University law professor Stephen Scott.(25) He suggests that the federal government use its disallowance power to block provincial legislation which attempted to circumvent Charter guarantees by the use of section 33 and that it undertake not to resort to the notwithstanding clause itself. While there is no reason to believe that such a move would be legally ineffective, there is every reason to believe that it would be politically explosive. One can imagine the reaction, for example, of political and public opinion in Quebec if the federal government disallowed legislation to promote the French language. Disallowance has not been resorted to since 1943 and its use in the manner proposed by Scott would surely inflame tensions between the federal government and the provinces.

Another restriction that could be placed on the override would be to reduce the Charter rights and freedoms to which it could be applied. As already noted, initially the override was to be available in cases of conflict with legal or equality rights but not fundamental freedoms. If this were presently the scope of section 33, the use of the override would not render the Quebec legislation respecting commercial signs effectively beyond legal challenge, as such a challenge would be principally based on the fundamental freedom of expression. Of course, it

(25) "Entrenchment by Executive Action: A Partial Solution to Legislative Override" in Supreme Court Law Review 1982, Butterworths, 1983.

could still be found that the legislation in question did not offend freedom of expression or that if it did, it was a reasonable limitation on that freedom.

Other methods could include a requirement that a simple majority of members of a legislature or Parliament voting on legislation containing an override would not be sufficient; instead a two-thirds or other proportion greater than the simple majority would be required. The notwithstanding clause could be amended to provide that the official oppositions in Parliament or the legislatures be required in some manner to signify assent to its use. Legislation containing the override could be made subject to ratification by referendum. In order to avoid absurd consequences in cases of legislation intended to apply for a short time (such as laws ending labour disputes), the referendum requirement might be designed to be triggered only in the event that the legislation remained in effect after a defined period, for example, of two or three years. All of these latter suggestions are intended to limit the use of the override to situations where support for its use is broader than simply that of the government of the day which might command a legislative majority but lack any specific electoral mandate to enact the legislation in question.

CONCLUSION

In the Chaussures Brown's case, the Supreme Court ruled that all that was required to effectively invoke section 33 was that the conditions as to form be respected. In other words, the legislation or portions of legislation sought to be shielded from Charter challenges must be clearly identified as well as the sections of the Charter which are not to be applied. The courts will not look to the reasonableness of the use of the notwithstanding clause or the extent to which the protected legislation infringes Charter rights. Thus, the debate is removed from the judicial sphere and the question of the use of the override remains a political one.